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TENAGA NASIONAL BHD v. PEARL ISLAND RESORT DEVELOPMENT SDN BHD

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
B
AHMAD MAAROP FCJ
ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 02-61-07-2014(P)]
27 MARCH 2017

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LIMITATION: *Accrual of cause of action – Acknowledgment – Encashment of bank guarantee – Whether constituted part payment under s. 26(2) of Limitation Act 1953 – Whether part payment under s. 26(2) could be made by a third party – Whether 'person liable or accountable therefor … makes any payment in respect*
D *thereof …' covers both principal debtor and guarantor/surety in respect of debt due by principal debtor – Whether right of action deemed to have accrued on date of last payment – Whether action within time limit*

CONTRACT: *Guarantee – Bank guarantee – Encashment of bank guarantee – Whether constituted part payment under s. 26(2) of Limitation Act 1953 – Whether*
E *part payment under s. 26(2) could be made by a third party – Whether call on bank guarantee for purpose expressed in guarantee – Whether bank discharged obligation under guarantee – Whether right of action deemed to have accrued upon encashment of bank guarantee – Whether action within time limit*

F ***STATUTORY INTERPRETATION****: Construction of statutes – Interpretation – Phrase 'person liable or accountable therefor' in s. 26(2) of Limitation Act 1953 – Whether use of word 'person' manifests intention of Legislature that person liable under s. 26(2) may or may not be principal debtor – Whether phrase to be read disjunctively – Whether part payment for purposes of limitation of time could be made by third party*

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The appellant's ('TNB') case was based on a breach of contract. By a supply contract, TNB agreed to supply electricity to the respondent at its premises. However, the respondent defaulted in the payment of its monthly electricity bills due to TNB amounting to RM463,334.08. The respondent admitted the amount due to TNB and therefore, entered into a settlement agreement with
H TNB to pay the arrears in ten monthly instalments by way of post dated cheques. As a security for the payment of the bills for the supply of electricity under the contract, the respondent provided TNB with a bank guarantee by EON Bank Bhd ('the bank'). The respondent paid the first three monthly instalments. However, it failed to pay the balance monthly instalments due

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under the settlement agreement. The notice of demand for the outstanding arrears sent by TNB was not responded to by the respondent resulting in TNB disconnecting the electricity supply to the respondent's premises. TNB called on the bank guarantee, which was encashed and the sum of RM80,000 was credited into the respondent's account with TNB. TNB also forfeited the sums of RM13,219.47 and RM3,310.22 respectively, which were the respondent's deposits from other closed accounts with TNB. Subsequently, TNB commenced a writ action against the respondent claiming the balance of outstanding arrears of electricity bills and charges amounting to RM510,474.16. The respondent raised a defence of limitation under s. 6 of the Limitation Act 1953 ('the Act') as the suit was commenced more than six years after the cause of action had accrued. In reply to the defence of limitation, TNB pleaded that its action was not time barred as the cause of action only accrued on 31 May 2006, the date when the bank guarantee was encashed. It was contended that the payment by the bank pursuant to the call on the bank guarantee constituted part payment under s. 26(2) of the Act in respect of the debt due. The respondent, on the other hand, counterclaimed for, among others, refund of the instalments, the repayment of RM80,000 under the bank guarantee; the deposit amounts forfeited by TNB and the costs of operating and maintaining an alternative generator for supply of electricity to the respondent's premises after the electricity supply to the premises was disconnected by TNB. The High Court dismissed TNB's claim as well as the respondent's counterclaim. TNB appealed to the Court of Appeal whilst the respondent cross appealed against the dismissal of its counterclaim. The Court of Appeal dismissed the appeal by TNB and the respondent's cross appeal. The court was not persuaded by TNB's contention that part payment under s. 26(2) of the Act could be made by a third party. The Court of Appeal was also of the view that the bank could not be equated in law as the agent of the respondent in relation to the payment pursuant to the call on the bank guarantee. Hence, leave to appeal was granted to TNB on the question of law as follows: whether, for the purpose of s. 26(2), the words 'person liable or accountable therefor … makes any payment in respect thereof …' cover both the principal debtor (such as the respondent herein) and guarantor/surety in respect of the debt due and owing by the principal debtor.

Held (allowing appeal with costs; setting aside decisions of courts below)
Per Abu Samah Nordin FCJ delivering the judgment of the court:

(1) Section 26(2) of the Act uses the word 'person', which is a wider term, instead of the word 'debtor'. This manifests a clear intention of the Legislature that 'the person liable or the person accountable' under

A s. 26(2) of the Act may or may not be the principal debtor. It is plain and obvious that the said phrase covers a third party (other than the principal debtor) who makes payment in respect of the debt. The phrase 'the person liable or accountable therefor' also should be read disjunctively as s. 26(2) of the Act uses the word 'or' instead of the word B 'and'. So, the 'person liable for the debt or the person accountable therefor' may or may not be the same person. It follows that the person (other than the principal debtor) may not be liable but may still be accountable for the debt or *vice versa*. It is a question of fact whether that person is a 'person liable or a person accountable' for the debt. (para 40)

C **(2)** Section 79 of the Contracts Act 1950 ('Contracts Act') defines a 'contract of guarantee' as a contract to perform the promise, or discharge the liability, of a third person in case of his default. Section 80 of the Contracts Act provides that, 'anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to D the surety for giving the guarantee'. A guarantee is therefore a binding promise of one person to be answerable for the debt or obligation of another if that other defaults. (para 42)

(3) The expressed purpose of the guarantee was to pay the electricity bills owed to TNB in the event the respondent defaulted. The bank did not E contest the call on the bank guarantee and duly paid TNB the sum as demanded. When the bank made the payment to TNB it had in law discharged its obligation under the guarantee. The payment was not for any other purpose other than to pay the electricity bills owed to TNB. In truth the payment by the bank was not made gratuitously. (paras 45, F 46 & 48)

(4) Section 98 of the Contracts Act provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover whatever sum he has rightfully paid under the guarantee, but not sums which he has G paid wrongly. That provision entitles the bank to be indemnified by the respondent in respect of the payment made under the guarantee. (para 48)

(5) The phrase 'person liable or accountable therefor' in s. 26(2) of the Act covers both the principal debtor and the guarantor in respect of the debt H due and owing by the principal debtor. The bank was undoubtedly 'liable to be called to account' or 'the person accountable' to make the payment as it was obliged under the guarantee to make good the promise to pay the electricity bills when the respondent defaulted. The payment by the bank pursuant to the call on the bank guarantee amounted to part

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payment of the debt owed by the respondent within the meaning of s. 26(2) of the Act, with the result that the right of action shall be deemed to have accrued on and not before the date of the last payment *ie*, 31 May 2006. So, when TNB filed its suit on 28 February 2012, the action was not time barred. (paras 49 & 55)

Bahasa Malaysia *Headnotes*

Kes perayu ('TNB') adalah berasaskan kemungkiran kontrak. Melalui satu kontrak pembekalan, TNB bersetuju membekalkan elektrik kepada responden di premisnya. Walau bagaimanapun, responden ingkar dalam pembayaran bil elektrik bulanan kepada TNB yang berjumlah RM463,334.08. Responden mengakui jumlah yang terhutang kepada TNB dan dengan itu memasuki perjanjian penyelesaian dengan TNB untuk membayar tunggakan tersebut dalam sepuluh ansuran melalui cek tarikh hadapan. Sebagai jaminan bagi bayaran bil-bil pembekalan elektrik bawah kontrak tersebut, responden memberikan kepada TNB satu jaminan bank oleh EON Bank Bhd ('bank'). Responden telah membayar tiga ansuran bulanan. Tetapi, ia gagal membayar baki ansuran bulanan yang tertunggak di bawah perjanjian penyelesaian. Notis tuntutan bagi jumlah tertunggak yang dihantar TNB tidak dijawab oleh responden menyebabkan TNB memutuskan bekalan elektrik ke premis responden. TNB menuntut bayaran daripada jaminan bank, yang ditunaikan dan sejumlah RM80,000 dimasukkan dalam akaun responden dengan TNB. TNB juga merampas jumlah RM13,219.47 dan RM3,310.22 masing-masing, iaitu deposit responden daripada akaun-akaun lain dengan TNB yang telah ditutup. Kemudian TNB memulakan tindakan writ terhadap responden memohon baki bil elektrik tertunggak dan caj-caj berjumlah RM510,474.16. Responden membangkitkan pembelaan had masa bawah s. 6 Akta Had Masa 1953 ('Akta') kerana guaman tersebut dimulakan lebih enam tahun dari tarikh kausa tindakan terakru. Dalam jawapan pada pembelaan had masa, TNB memplidkan bahawa tindakannya tidak terhad masa kerana kausa tindakan terakru hanya pada 31 Mei 2006, tarikh bila jaminan bank tersebut ditunaikan. Dihujahkan bahawa bayaran oleh bank menurut tuntutan terhadap jaminan bank tersebut membentuk sebahagian bayaran bawah s. 26(2) Akta berkaitan dengan hutang tertunggak. Sebaliknya, responden menuntut balas bagi, antara lain, pemulangan ansuran-ansuran, pembayaran balik RM80,000 bawah jaminan bank, jumlah deposit yang dirampas TNB dan kos mengendalikan dan menyenggara penjana bagi bekalan elektrik ke premis responden selepas bekalan elektrik ke premis tersebut dipotong TNB. Mahkamah Tinggi menolak tuntutan TNB dan tuntutan balas responden. TNB merayu ke Mahkamah Rayuan manakala responden merayu balas terhadap penolakan tuntutan balasnya. Mahkamah Rayuan menolak rayuan TNB dan rayuan balas responden. Mahkamah tidak menerima hujahan TNB bahawa sebahagian bayaran bawah s. 26(2) Akta

boleh dibuat oleh pihak ketiga. Mahkamah Rayuan juga berpendapat bahawa bank tidak boleh, dari segi undang-undang, disamakan sebagai ejen responden berkaitan pembayaran menurut tuntutan daripada jaminan bank. Dengan itu, kebenaran merayu diberikan pada TNB atas persoalan undang-undang: sama ada bagi tujuan s. 26(2) Akta, perkataan-perkataan 'person liable or accountable therefor … makes any payment in respect thereof …' meliputi kedua-dua penghutang utama (seperti responden di sini) dan penjamin berkaitan dengan hutang tertunggak dan terhutang oleh penghutang utama.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan mahkamah-mahkamah di bawah)
Oleh Abu Samah Nordin HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 26(2) menggunakan perkataan 'person', yang termanya luas, dan bukan perkataan 'debtor'. Ini menunjukkan niat jelas perundangan bahawa 'the person liable or the person accountable' bawah s. 26(2) Akta boleh termasuk atau tidak termasuk penghutang utama. Jelas bahawa frasa tersebut merangkumi pihak ketiga (selain daripada penghutang utama) yang membuat bayaran berkaitan hutang. Frasa 'the person liable or accountable therefor' juga perlu dibaca secara berasingan kerana s. 26(2) Akta menggunakan perkataan 'atau' dan bukan 'dan'. Oleh itu, 'person liable for the debt or the person accountable therefor' boleh menjadi orang yang sama atau tidak. Berikutan itu seseorang (yang selain daripada penghutang utama) mungkin tidak bertanggungan tetapi masih boleh menanggung hutang atau sebaliknya. Persoalan sama ada 'person liable or a person accountable' bagi hutang tersebut adalah persoalan fakta.

(2) Seksyen 79 Akta Kontrak 1950 ('Akta Kontrak') mentafsirkan 'kontrak jaminan' sebagai kontrak untuk melaksanakan janji, atau melepaskan tanggungjawab, oleh pihak ketiga jika dia ingkar. Seksyen 80 Akta Kontrak memperuntukkan bahawa, 'apa-apa yang dibuat, atau janji yang diberikan, bagi faedah penghutang utama adalah balasan mencukupi bagi penjamin memberikan jaminan.' Sesuatu jaminan adalah janji yang mengikat seseorang untuk bertanggungjawab bagi hutang atau tanggungan seorang yang lain jika orang yang lain itu ingkar.

(3) Tujuan jelas jaminan tersebut adalah untuk membayar bil elektrik yang dihutang kepada TNB jika responden ingkar. Bank tidak mempertikaikan tuntutan jaminan bank dan sewajarnya membayar TNB jumlah yang dituntut. Apabila bank membayar TNB, ia telah melepaskan tanggungjawabnya bawah jaminan tersebut. Bayaran tersebut bukan untuk tujuan selain daripada membayar bil elektrik yang dihutang pada TNB. Sebenarnya, bayaran oleh bank tidak dibuat secara yang tidak sepatutnya.

(4) Seksyen 98 Akta Kontrak memperuntukkan bahawa dalam setiap kontrak jaminan terdapat janji tersirat oleh penghutang utama untuk membayar ganti rugi kepada penjamin; dan penjamin berhak mendapatkan semula apa-apa jumlah yang telah dibayarnya bawah jaminan tersebut, tetapi bukan jumlah yang tersalah bayar. Peruntukan tersebut memberikan hak pada bank untuk dibayar ganti rugi oleh responden berkaitan dengan bayaran yang dibuat bawah jaminan.

(5) Frasa 'person liable or accountable therefor' dalam s. 26(2) Akta meliputi kedua-dua penghutang utama dan penjamin berkaitan hutang tertunggak dan terhutang oleh penghutang utama. Tidak diragui bank 'bertanggungjawab untuk menanggung' atau 'pihak yang bertanggungjawab' untuk membuat bayaran kerana ia bertanggungjawab bawah jaminan untuk melunaskan janji membayar bil elektrik apabila responden ingkar. Bayaran oleh bank menurut tuntutan atas jaminan bank membentuk sebahagian bayaran hutang responden dalam maksud s. 26(2) Akta, dengan kesan hak tindakan dianggap terakru pada dan bukan sebelum tarikh pembayaran terakhir dibuat iaitu 31 Mei 2006. Oleh itu, apabila TNB memfailkan guamannya pada 28 Februari 2012, tindakan tersebut tidak terhad masa.

Case(s) referred to:

Askaram Sowkar (Decree Holder) v. Venkataswami Naidu & 2 Ors [1920] Ind LR Vol XLIV ***(refd)***

Bhuban Mohan Sinha v. Ram Sobinda Goswami [1926] Ind, LR Vol LIV 179 ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2008] 6 MLJ 636 ***(refd)***

Lam Wai Hwa & Anor v. Toh Yee Sum & Ors [1981] 1 LNS 84 FC ***(refd)***

Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor [2011] 1 LNS 791 HC ***(foll)***

National Bank of Upper India v. Bansidhar [1930] 32 BOMLR 136 ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

Pinner v. Everett [1969] 1 WLR 1266 ***(refd)***

Re Footman Bower & Co Ltd [1961] 2 All ER 161 ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Sunbird Plaza Pty Ltd v. Maloney [1988] 166 CLR 245 ***(refd)***

UCB Corporate Services v. Kohli [2004] 2 All ER (Comm) 422 ***(refd)***

Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

WTK Holdings Bhd v. Foo Sae Heng & Anor [2011] 5 CLJ 433 CA ***(foll)***

Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 79, 98
Limitation Act 1953, ss. 6, 26(2), 27(1)

Limitation Act 1939 [UK], s. 23(4)
Limitation Act 1963 [Ind], s. 19

Other source(s) referred to:
Halsbury's Laws Statutes, vol 44(1), (Reissue), para 1487
Halsbury's Law of England, 4th edn. (Reissue), para 1104, p 564
Mitra's Law of Limitation & Prescription, vol 1, 12th edn, Reprint 2010, p. 609

For the appellant - Steven Thiru, Ong Wee En & David Mathews; M/s Lim Huck Aik & Co
For the respondent - M Thayalan; M/s Shearn Delamore & Co

[Editor's note: For the Court of Appeal judgment, please see Tenaga Nasional Bhd v. Pearl Island Resort Development Sdn Bhd [2015] 1 CLJ 1114 (overruled).]

Reported by S Barathi

JUDGMENT

Abu Samah Nordin FCJ:

[1] This is yet another case where lack of diligence in pursuing a rightful claim in a timeous manner had resulted in the claim being dismissed by the trial court on the ground of limitation, which decision was affirmed by the Court of Appeal.

[2] The appellant's case is based on a breach of contract. By a supply contract ('the contract') dated 6 June 2001 Tenaga Nasional Berhad ('the appellant') agreed to supply electricity to Pearl Island Resort Development Sdn Bhd ('the respondent') at its premises at Lot 8134, Jalan Relau, Bayan Lepas, Pulau Pinang, upon the terms and conditions as provided therein. The said premises is a club house with a golf course owned by the respondent.

[3] The respondent had defaulted in payment of its monthly electricity bills. As at 10 June 2005 the arrears of electricity bills due to the appellant was RM463,334.08. The respondent admitted the amount due to the appellant and agreed to settle the sum in ten monthly instalments.

[4] So on the same date the respondent entered into a settlement agreement with the appellant to pay the arrears due to the appellant in ten monthly instalments by way of postdated cheques, according to the schedule of payment which is reproduced below:

SCHEDULE OF PAYMENT

(Clause 1.1 and Clause 2.1.1 of Deed Of Settlement)

Payment	Date	Arrears Payment	Current Month
1	24-06-2005	25,000.00	0
2	24-07-2005	25,000.00	0
3	24-08-2005	25,000.00	0
4	24-09-2005	55,500.00	In Full
5	24-10-2005	55,500.00	In Full
6	24-11-2005	55,500.00	In Full
7	24-12-2005	55,500.00	In Full
8	24-01-2006	55,500.00	In Full
9	24-02-2006	55,500.00	In Full
10	24-03-2006	55,334.08	
	Total	463,334.08	

In the 4th month, the bill is inclusive of current month and arrears for bill not paid from 24-6-2005.

Note: Payments are by way of ten (10) post-dated. The post-dated cheques shall be dated on 24th day of each subsequent month.

[5] As a security for the payment of the bills for the supply of electricity under the contract, the respondent provided the appellant with a bank guarantee dated 8 July 2005 wherein EON Bank Bhd ('the bank') agreed to, "guarantee the payment to the company by the consumer of such sums of money not exceeding the sum of RM80,000 in all which may be owed by the consumer to the company and remain outstanding at any time and/or times during the guarantee period […] in respect of the supply of electrical energy …."

[6] The respondent paid the first three monthly instalments of RM25,000 on 24 June 2005, 24 July 2005 and 24 August 2005 respectively. It failed to pay the monthly instalments due under the settlement agreement from September 2005 onwards.

[7] By a letter dated 21 September 2005 the appellant issued a notice of demand to the respondent to pay the outstanding arrears of electricity bills amounting to RM531,473.06. It demanded that payment be made in seven monthly instalments of RM75,925, failing which, the electricity supply to

A the premises would be disconnected. This outstanding amount includes the amount of arrears for the current months still outstanding. There was no response from the respondent.

[8] On 5 October 2005 the appellant disconnected the electricity supply to the respondent's premises, which it was entitled to do under the contract.

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[9] On 14 February 2006 the appellant called on the bank guarantee. The bank guarantee was encashed on 31 May 2006 and the sum of RM80,000 was credited into the respondent's account with the appellant.

[10] On 12 November 2008 and 21 October 2010 the appellant forfeited
C the sums of RM13,219.47 and RM3,310.22 respectively, which were the respondent's deposits from other closed accounts with the appellant.

[11] On 28 February 2012 the appellant commenced a writ action against the respondent claiming the balance of outstanding arrears of electricity bills and charges amounting to RM510,474.16 which the respondent had
D defaulted despite repeated written demands to make the payments. The appellant also claimed interest at 4% per annum on the outstanding amount and costs.

[12] The respondent raised a defence of limitation under s. 6 of the
E Limitation Act 1953 ('the Act') as the suit was commenced more than six years after the cause of action had accrued. In reply to the defence of limitation the appellant pleaded that its action was not time barred as the cause of action only accrued on 31 May 2006, that is, on the date when the bank guarantee was encashed. It was contended that the payment by EON Bank pursuant to the call on the bank guarantee constituted part payment
F under s. 26(2) of the Act in respect of the debt due. The effect of such part payment was that the right of action was deemed to have accrued on and not before date of the part payment. In making the payment the bank was acting as an agent of the respondent.

G **[13]** The respondent counterclaimed against the appellant, claiming, among others:

(a) refund of the instalments of RM75,000;

(b) the repayment of the sum of RM80,000 under the bank guarantee which the respondent claimed to have been wrongfully demanded upon and
H received by the appellant;

(c) RM16,529.69 being the deposit sum alleged to have been wrongfully appropriated by the appellant;

(d) a sum of RM75,000 alleged to be the costs of operating and maintaining
I an alternative generator for supply of electricity to the premises allegedly incurred by the respondent, after the electricity supply to the premises was disconnected by the appellant; and

(e) refund of RM150,000 being a further deposit paid by the respondent to the appellant on 6 June 2001 for obtaining connection of electricity supply to the premises.

[14] The High Court dismissed the appellant's claim as well as the respondent's counterclaim. The counterclaim was dismissed as being without merits. The appellant appealed to the Court of Appeal against the decision of the High Court in dismissing its claim. The respondent cross appealed against the dismissal of its counterclaim.

[15] At the trial before the High Court, the learned trial judge had to decide:

(i) on the date when the six year limitation period under s. 6(1) of the Act began to run; and

(ii) whether the payment of RM80,000 by the bank pursuant to the call on the bank guarantee constituted "part payment" of the outstanding debt due to the appellant within the meaning of s. 26(2) of the Act.

[16] The respondent contended that the limitation period began to run on the date when it defaulted in making the fourth instalment, that is, on 24 September 2005 and expired on 23 September 2011. As the action was commenced on 28 February 2012, the action was barred by limitation by virtue of s. 6(1) of the Act.

[17] The appellant however contended that the limitation period began to run on the date it encashed the payment made by the bank, that is, on 31 May 2006. The payment by the bank constituted "part payment" of the outstanding debt under the settlement agreement by virtue of s. 26(2) of the Act. The six-year limitation period only expired on 30 May 2012. As the action was filed on 28 February 2012, it was well within the limitation period under s. 6(1) of the Act.

[18] The learned trial judge held that the time began to run on 23 October 2005, that is, on the date when the respondent failed to pay all the sums due to the appellant within 30 days from the date of the notice of disconnection of electricity supply. The limitation period expired on 22 October 2011. As the action was filed on 28 February 2012, its claim was statute barred.

[19] The learned trial judge held the view that payment by the bank did not constitute part payment under s. 26(2) of the Act. This was because the bank guarantee was a separate and independent contract between the appellant and the bank only. In His Lordship's view the 'person liable or accountable' under s. 26(2) of the Act was the respondent, being the principal the debtor and that payment must come directly from him and not from the bank. This is what the learned judge said in paras. 44 and 45 of His Lordship's judgment:

A 44. The monies pursuant to the encashment of the Bank Guarantee did not come from the Defendant (person liable or accountable for the debt). It was trite that a Bank Guarantee of the nature here (see pages 22/23 CABD-1) was a separate and independent contract between the Plaintiff and the Bank only and as provided therein the Bank was to pay the Plaintiff within seven days of receipt of the
B relevant notice of default (see Clause 3). The Plaintiff was entitled to enforce this contract of guarantee (or indemnity, in a sense) without reference to the Defendant and interestingly as stated in Clause 6, notwithstanding even the Defendant's 'liquidation or winding-up'.

C 45. Payment received under the Bank Guarantee from the Bank did not emanate therefore from the Defendant and by no stretch of argument could it be justified or deemed, in my view, as a 'part payment' made by the Defendant to qualify for the postponement envisaged by s. 26(2) of the Limitation Act, 1953. No notice or consent of the Defendant was involved at all here. The purport and
D intent of that subsection was clear that the 'payment' had to come from the debtor directly. It was not the function of the court to add to or vary the plain meaning of the words used in the legislation.

Counterclaim

E **[20]** The learned trial judge dismissed the counterclaim as being without merits, holding that the settlement agreement was valid and enforceable against the respondent.

[21] Both the appellant and the respondent appealed to the Court of Appeal against the decision of the High Court. At the Court of Appeal, the appellant
F confined its ground of appeal to the issue of limitation only, by articulating the issue as follows:

(i) did the encashment of the bank guarantee by the appellant on 31 May 2006 amount to a part payment under s. 26(2) Limitation Act 1953, therefore giving rise to a fresh accrual of action; and

G (ii) did the appellant's 'delay' in encashing the bank guarantee prevent the operation of s. 26(2) of the Limitation Act 1953.

[22] Learned counsel for the appellant relied on *Malaysia Building Society Berhad v. KL Al Dhuha Sdn Bhd & Anor* [2011] 1 LNS 791 and *WTK Holdings*
H *Bhd v. Foo Sae Heng & Anor* [2011] 5 CLJ 433 in support of his contention that the part payment under s. 26(2) of the Act need not have to be made by the respondent itself. It could be made by a third party, such as the bank in this case.

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[23] The Court of Appeal dismissed the appeal by the appellant and the respondent's cross appeal with no order as to costs. It was not persuaded by the appellant's contention that part payment under s. 26(2) of the Act could be made by a third party, holding that the facts in those two cases were distinguishable. In *Malaysia Building Society Berhad*'s case s. 26(2) of the Act applied because, 'there was an acknowledgement of the debt by the borrower after the expiry of the six years from the accrual of the cause of action in addition to the agreement to allow the acquisition sum to be paid directly to the plaintiff to offset the loan'. These elements were absent in the appeal before it. In *WTK Holdings Berhad*'s case, the High Court allowed the plaintiffs' claim because there was part payment made by an associate company of the borrower. Abdul Wahab Patail JCA in delivering the judgment of the Court of Appeal in that case however held that s. 26(2) of the Act did not apply as it was not established on the evidence that the associate company had acted as an agent of the borrower when it paid the lender.

[24] The Court of Appeal in the instant appeal before us was also of the view that on the facts of the case the bank could not be equated in law as the agent of the respondent in relation to the payment pursuant to the call on the bank guarantee. It did not however substantiate why it came to that conclusion.

[25] In essence, by affirming the decision of the High Court, the Court of Appeal agreed with the trial judge that 'the person liable or accountable' in s. 26(2) of the Act must be the principal debtor and that any payment under s. 26(2) of the Act could only be made by the principal debtor and not by a third party, namely, the bank.

Leave To Appeal

[26] On 8 July 2014, this court granted the appellant leave to appeal on a single question of law:

> Whether for the purpose of s. 26(2) the words "person liable or accountable therefor … makes any payment in respect thereof …" cover both the principal debtor (such as the Respondent herein) and guarantor/surety in respect of the debt due and owing by the principal debtor?

[27] Section 26(2) of the Act states:

> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> Provided …
>
> (emphasis added)

A **Submission By Parties**

[28] The crux of the dispute between the parties is on the interpretation of the phrase, "the person liable or accountable therefor … makes any payment in respect thereof" in s. 26(2) of the Act. It is the contention of the appellant that "the person liable or accountable therefor" may or may not be the B principal debtor. It depends on the facts and circumstances of the particular case. It is wide enough to include a surety or the guarantor, such as EON Bank in this case which had acted as an agent for the respondent when it made the payment under the bank guarantee. See *Malaysia Building Society Bhd, supra, WTK Holdings Bhd, supra*. The appellant further relied on *UCB* C *Corporate Services v. Kohli* [2004] 2 All ER (Comm) 422 and *Lam Wai Hwa & Anor v. Toh Yee Sum & Ors* [1981] 1 LNS 84; [1981] 2 MLJ 139 as authority for the proposition that the payment could be made by a third party.

[29] It was submitted that the payment by the bank under the bank D guarantee amounted to a part payment under s. 26(2) of the Act. The effect of the part payment was to revive the cause of action, with the result that time began to run not from date of the default on 23 October 2005 but from the date of the part payment, namely, 31 May 2006. As the action was filed on 28 February 2012, it was not barred by limitation.

E **[30]** By way of comparison the appellant pointed out that s. 26(2) of the Act is similar to s. 23(4) of the UK Limitation Act 1939. In *Re Footman Bower & Co Ltd* [1961] 2 All ER 161, a case under s. 23(4) of the UK Limitation Act 1939, Buckley J opined that "any payment in respect of a debt will make time to run afresh in respect of that debt".

F **[31]** The respondent on the other hand contended that the phrase the person liable or accountable therefor … in s. 26(2) of the Act could not be any other person other than the principal debtor, namely the respondent. EON Bank was not and could not conceivably be the person liable or accountable for the debt for obvious reason that any acknowledgment referred to in s. 26(2) G must be in writing and signed by the person making the acknowledgment as required by s. 27(1) of the Act. To accept the appellant's contention that the EON Bank is a person liable or accountable is to import or read into s. 26(2) the words to the effect that the person liable or accountable for the debt could be any third party. When the language used in a statute is clear, effect must H be given to it. The respondent's counsel cited to us two cases on the interpretation of a statute in support of his contention that the plain and ordinary meaning of the phrase person liable or accountable must be the principal debtor and cannot be any third party. The first case is *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] I 6 MLJ 581, where the Federal Court approved its earlier decision (the Supreme Court, as it then was) in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 wherein Seah SCJ said:

Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at pp. 161-162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[32] The second case is *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 where Abdoolcader SCJ cautioned against reading into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do:

> We would in this regard also advert to the decision of the House of Lords in *Thompson v. Goold & Co.* where Lord Mersey said in his speech (at page 420): 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'. Even more pertinent perhaps would be the speech of Lord Loreburn, L.C. in *Vickers, Sons and Maxim, Limited v. Evans* when he said at page 445):
>
> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say … The appellant's contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

[33] It was further submitted that payment by the bank under the bank guarantee could not amount to part payment under s. 26(2) of the Act because the bank guarantee was a separate and independent contract between the bank and the appellant: see *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1, *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2008] 6 MLJ 636. Only the appellant could make a call on the bank guarantee. The respondent has no right to make the call. Under the terms of the bank guarantee the bank is not obliged to notify the respondent when the call on the bank guarantee is made by the appellant.

A **The Decision**

[34] The question of law posed to this court is strictly a matter of construction of a specific provision of a statute. It is whether the phrase "person liable or accountable therefor … makes any payment in respect of thereof …" in s. 26(2) of the Act covers both the principal debtor and guarantor in respect B of the debt due and owing by the principal debtor. As the question of law is confined to the said phrase alone, what amounts to an acknowledgment under s. 26(2) or 27 of the Act is not an issue which requires the determination of this court. The dispute between the parties is in respect of the payment by the bank and not on whether or not there was any C acknowledgement of the claim by the bank.

[35] There is no dearth of authorities on the principles of construction of a statute. The first thing to ask is what is the natural or ordinary meaning of the word or phrase in its context in the statute. Where the language in the statute is clear and without any ambiguity effect must be given to it: see D *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor, supra*. In *Pinner v. Everett* [1969] 1 WLR 1266, Lord Reid at p. 1273 said:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning E leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.

[36] As it is aptly put in *Halsbury's Laws Statutes*, vol. 44(1) (Reissue) para. 1487:

F

> If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.

[37] The expression, the person liable is not defined in the Act. A similar G expression appears in s. 19 of the Indian Limitation Act 1963.

> s. 19 Where the payment on account of a debt or of interest on a legacy is made … by the person liable to pay the debt or legacy… a fresh period of limitation shall be computed from the time when the payment was made:
>
> H Provided …
>
> (emphasis added)

[38] Although the wording of s. 19 of the Indian Limitation Act 1963 is not the same as s. 26(2) of our Act, it also provides that a fresh period of limitation shall be computed from the time when the payment was made. I The courts in India had interpreted the expression, the person liable as

including third party: See *Askaram Sowkar (Decree Holder) v. Venkataswami Naidu & 2 Ors* [1920] Ind. LR Vol. XLIV 544, *Bhuban Mohan Sinha v. Ram Sobinda Goswami* [1926] Ind, LR Vol. LIV 179 (Calcutta Series); *National Bank of Upper India v. Bansidhar* [1930] 32 BOMLR 136.

[39] *Mitra's Law of Limitation & Prescription*, Vol. 1, 12th edn. Reprint 2010 in its commentaries on s. 19 of the Indian Limitation Act 1963 at p. 609 expressed the following view:

> Payment by whom – The expression "the person liable to pay the debt, taken by itself, is perhaps more extensive than the term the debtor. Where in a suit for recovery of loan amount filed by the Bank against a company and its Directors, the Directors were found to be personally liable for repayment of loan and one of the Directors who was authorised by other Directors of company to transact with the Bank had further deposited cheques with the Bank with a request to credit the same on the loan account of company, and the endorsement were written by Directors as required by proviso to S.19, such endorsements and payments would save the suit from the bar of limitation. The Documents executed should be construed to be acknowledgments.
>
> …
>
> In *Somasundara v. Narsimhachari*, subsequent to borrowing money on a promissory note the father became a convert to Islam along with his eldest son. Later on the father died and sometime thereafter a younger son made payments of interest and duly endorsed them. The payments were held to be by a person liable to pay and therefore sufficient to extend limitation even against the convert son. A person need not be personally liable. The word 'person' liable to pay are of wide connotation and will cover property liability also. As by Section 28 of the Provincial Insolvency Act, the title to the estate of an insolvent vests in the Official Receiver he is a person liable to pay the debt within the meaning of Section 19. A widow acquiring an interest under the Hindu women's Rights to Property Act, 1937 is also a person liable to pay the debt and a payment made by her furnishes a fresh starting point under the section.

[40] Now, consider s. 26(2) of the Act. The first thing to note is that s. 26(2) of the Act uses the word 'person', which is a wider term, instead of the word, 'debtor'. This manifests a clear intention of the Legislature that the person liable or the person accountable under s. 26(2) of the Act may or may not be the principal debtor. It is plain and obvious that the said phrase covers a third party (other than the principal debtor) who makes payment in respect of the debt. Secondly, the phrase "the person liable or accountable therefor" should be read disjunctively as s. 26(2) of the Act uses the word 'or' instead of the word 'and'. So, the person liable for the debt or the person accountable therefor may or may not be the same person. It follows that the person (other than the principal debtor) may not be liable but may still be accountable for the debt or *vice versa*. It is a question of fact whether that person is a person liable or a person accountable for the debt.

[41] The shorter *Oxford Dictionary* vol. 1, 3rd edn. defines the word 'accountable', *inter alia*, as 'liable to be called to account'. The issue before this court is whether EON Bank which provided the bank guarantee at the behest of the respondent and made the payment to the appellant pursuant to the call on the bank guarantee is a person liable or a person accountable under s. 26(2) of the Act. It is not in dispute that EON Bank is not the principal debtor.

[42] At this juncture, it would be a useful reminder to ask what is a guarantee? Section 79 of the Contracts Act 1950 defines a 'contract of guarantee' as a contract to perform the promise, or discharge the liability, of a third person in case of his default. Section 80 of the Contracts Act provides that, 'Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee'. A guarantee is therefore a binding promise of one person to be answerable for the debt or obligation of another if that other defaults: see *Sunbird Plaza Pty Ltd v. Maloney* [1988] 166 CLR 245; *Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828. Mason CJ in *Sunbird Plaza Pty Ltd v. Maloney* described the guarantee as a promise to 'answer for' the debt or default of another.

[43] Now, take a close look at the bank guarantee given by EON Bank to the appellant. It is addressed to the appellant as follows:

> **Bank Guarantee For Payment Of Bill/Liquidated Damages**
>
> In consideration of Tenaga Nasional Berhad (hereafter referred to as the company) supplying electrical energy or hiring apparatus to PPH Resorts (Penang) Sdn Bhd …, hereinafter referred to as the Consumer' EON BANK Bhd … thereinafter referred to as the "Bank") hereby guarantee the payment to the Company by the Consumer of such sums of money not exceeding the sum of RM80,000.00 in all which may be owed by the Consumer to the Company and remain outstanding at anytime and/or times during the guarantee period (in respect of liquidated damages, as provided for under the contract of supply of electrical energy by the Company to the consumer and) in respect of the supply of electrical energy and/or hire of apparatus by the Company to the Consumer. (emphasis added)

[44] The appellant's letter to EON Bank dated 14 February 2006 calling on the bank guarantee states:

> Merujuk kepada perkara di atas, pihak TNB Bayan Baru secara rasmi ingin membuat tuntutan dari Jaminan Bank yang dikeluarkan oleh pihak tuan, agar dibayar secara tunai dalam bentuk 'cek' atau 'Bankers Cek' atas nama 'Tenaga Nasional Berhad' sebanyak RM80,000.00 dengan serta-merta. Sesalinan Jaminan Bank terlibat disertakan.

> Ini adalah berikutan kegagalan pihak PPH Resorts membayar bil elektrik mereka yang kini berjumlah RM574,346.81. Untuk makluman tuan, bekalan elektrik telah dipotong pada 05.10.2005 yang lalu.

[45] EON Bank did not contest the call on the bank guarantee. It duly paid the appellant the sum as demanded. The appellant admitted in its statement of claim that it had received the sum of RM80,000 from EON Bank and had credited the said sum into the respondent's account with the appellant, thereby reducing the outstanding debt under the settlement agreement by RM80,000.

[46] When the bank made the payment to the appellant it had in law discharged its obligation under the guarantee. The expressed purpose of the guarantee was to pay the electricity bills owed to the appellant in the event the respondent defaulted. It could not be for any other purpose as the terms of the bank guarantee are very clear.

[47] *Halsbury's Law of England*, 4th edn. (Reissue) in para. 1104 at p. 564 explained the payment in respect of debt or claim in the following words:

> When it is once established that the payment was made in respect of some debt and that no other debt than the one sued for then existed, the inference may be drawn that the payment was in respect of the debt sued for.

[48] The facts in this case show that the payment was not for any other purpose other than to pay the electricity bills owed to the appellant. In truth the payment by the bank was not made gratuitously. In a normal case of a bank guarantee there exists a prior arrangement between the debtor and the bank before the issuance of the bank guarantee. There is a provision in s. 98 of the Contracts Act 1950 that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongly. That provision entitles the bank to be indemnified by the respondent in respect of the payment made under the guarantee.

[49] In the circumstances of this case the bank is undoubtedly the party who is 'liable to be called to account' or the person accountable' to make the payment as it is obliged under the guarantee to make good the promise to pay the electricity bills when the respondent defaulted. In our judgment the payment by the bank pursuant to the call on the bank guarantee amounted to part payment of the debt owed by the respondent within the meaning of s. 26(2) of the Act, with the result that the right of action shall be deemed to have accrued on and not before the date of the last payment. That date was 31 May 2006. As the action was filed on 28 February 2012 the action was not barred by limitation.

[50] The High Court and the Court of Appeal which concurred with the decision of the High Court therefore erred in holding that the phrase person liable or accountable therefor in s. 26(2) of the Act could only mean the principal debtor, namely the respondent, and that for s. 26(2) of the Act to apply, the payment must be made by the principal debtor and not by a third party, namely the bank.

[51] *Malaysia Building Society Berhad*'s case and *WTK Holding Berha*d's case supported the appellant's contention that part payment under s. 26(2) of the Act could be made by a third party.

[52] In *WTK Holdings Berhad*'s case the Court of Appeal had to decide:

> whether the sum of RM100,000 paid by Westmont Land (Asia) Berhad to the plaintiffs on 5.2.1997 was payment made on behalf of the defendant or Westmont Holdings Sdn Bhd.

[53] In that case, WTK Holding Berhad (the defendant) pleaded that the plaintiffs' action was time barred under s. 6(1) of the Limitation Act 1953. The plaintiffs pleaded that the action was not time barred by virtue of s. 26(2) of the Act as there was part payment made by Westmont Land (Asia) Berhad, an associate company of the defendant on 5 February 1997. The High Court held that the action was not time barred. The Court of Appeal had to decide whether the payment by Westmont Land (Asia) Berhad, a third party, was a part payment under s. 26(2) of the Act and made on behalf of the defendant. If the payment by the third party was made on behalf of the defendant, then by operation of s. 26(2) and s. 27(2) of the Act time began to run from 5 February1997 and therefore the action was not time barred. If the payment was not made on behalf of the defendant, time would begin to run from 13 September 1995 in which case the action would be time barred. The Court of Appeal reversed the decision of the High Court on the ground that the plaintiffs failed to prove that the payment by the third party was made on behalf of the defendant. It must therefore be noted that the Court of Appeal did not say anywhere that part payment under s. 26(2) of the Act could not be made by a third party.

[54] Section 26(2) of the Act was discussed in *Malaysia Building Society Berhad*'s case. In that case the court had to decide whether a payment of RM1 million paid by Jabatan Alam Sekitar to Malaysia Building Society Bhd in respect of debt owed by the defendant (borrower) amounted to part payment under s. 26(2) of the Act. Coincidentally, the trial judge who wrote the judgment in that case was also the judge who wrote the judgment of the Court of Appeal in the case before us. In his judgment in the latter case, the learned judge held that *Malaysia Building Society Berhad*'s case was not an authority for a broad proposition that a part payment could be made by any third party

for s. 26(2) of the Limitation Act to apply. But that statement somewhat contradicted what the learned judge in his judgment in *Malaysia Building Society Berhad*'s case said:

> I agree with the Plaintiff that with this part payment, the 6 years corresponding to the limitation period should be calculated from this date, in which event this present suit is not time-barred. Consistent with section 26(2) of the Limitation Act, the right of action then is deemed to have accrued on, and not before, the date of last payment.
>
> …
>
> The relevant issue is the date of last payment. It is strictly speaking not even necessary to determine whether there was an acknowledgment of the debt, since the requirements of the section can be satisfied by any evidence of payment. These terms are used in the alternative. The argument of the Defendants that it was not the 1st Defendant who had paid the RM1 million, and therefore the subsection does not apply, is unconvincing. Why the 1st Defendant would agree to allow the Plaintiff to reduce its outstanding debt by RM1 million from the proceeds in 2008, when by its own argument the debt has been statute-barred in 2007, also defies logic and justification.

[55] On the face of the above statement, it appeared that the learned judge was also of the view that payment under s. 26(2) of the Act could be made by a third party. What then is the right answer to the question of law posed to this court? In our view the phrase 'person liable or accountable therefor' in s. 26(2) of the Act covers both the principal debtor and the guarantor in respect of the debt due and owing by the principal debtor. The payment made by the bank to the appellant pursuant to the call on the bank guarantee amounted to part payment under s. 26(2) of the Act, with the result that the right of action to recover the debt shall deemed to have accrued on and not before the date of the last payment. So, when the appellant filed its suit on 28 February 2012, the action was not time barred.

[56] For the aforesaid reasons the appeal by the appellant is allowed with costs and that the decisions of the courts below are set aside. It follows that the appellant's amended claim in the sum of RM510,747.17 with interest thereon at 4% per annum from the date of the judgment of the High Court, until realisation is allowed.